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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 75-1546

MRS. ETHEL KNIGHT,
Petitioner,

vs.

E. J. HOLDER, M.D., Individually, and E. J. HOLDER, M.D., and JAMES C. BASS, JR., M.D., d/b/a LAUREL BONE AND JOINT CLINIC,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSISSIPPI

QUESTIONS PRESENTED

I

Whether Petitioners Failed to Raise the Constitutional Issue Timely and Properly in the Courts Below, in Failing to Raise the Constitutional Question Prior to Her Petition for Rehearing to the Supreme Court of Mississippi.

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II

Whether the Court Below, in Reaffirming an Established Mississippi Rule That Expert Witnesses in Medical Malpractice Suits Are Not Qualified to Testify Unless They Are Familiar With Standards of Medical Practice in the Defendant's Locality, Decided a Federal Question of Substance, and Whether Its Decision Conflicts With Decisions of This Court.

STATEMENT OF THE CASE

This case began as a medical malpractice suit in the Circuit Court of the Second Judicial District of Jones County, Mississippi. Petitioner was plaintiff and Respondents defendants.

Trial resulted in a jury verdict for Respondents. In her motion for new trial (A-1 to A-3), assignment of error to the Supreme Court of Mississippi (A-4 to A-5), and in her appellate brief (A-6 to A-18), Petitioner challenged, *inter alia*, the ruling of the trial court disqualifying Petitioner's expert medical witness on the ground he was not shown to be familiar with the standards of medical care, learning, skill and treatment of orthopedists practicing in the community of Laurel, Mississippi, Petitioner's contention, both in the trial court and before the Supreme Court of Mississippi, was simply that Mississippi's long-standing "locality rule" is unfair and outdated.

The locality rule provides that medical malpractice is judged according to standards of medical practitioners in the defendant's field of practice in the same community or locality as the defendant's. An important aspect of the rule governs qualification of expert medical witnesses, that is an expert must be familiar with local standards of medical care, learning, skill and treatment. See *Dazet v. Bass*, 254 So.2d 183 (Miss. 1971), and *Copeland v. Robertson*, 236 Miss. 95, 112 So.2d 236 (1959).

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The Supreme Court of Mississippi affirmed the decision of the lower court without opinion. (Petitioner's A-1 to A-2) Subsequently, Petitioner filed a petition for rehearing with the Supreme Court of Mississippi (A-19 to A-22) in which she claimed for the first time that the application of Mississippi's locality rule in the instant case was unconstitutional under both the Mississippi and United States Constitutions. Her petition was denied. (Petitioner's A-7 to A-8)

At no time prior to her petition for rehearing to the Supreme Court of Mississippi did Petitioner claim that application of the locality rule was unconstitutional. Rather, at all times prior to her petition for rehearing she vigorously urged the Mississippi Court to either modify or abandon the locality rule as a matter of state law.

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REASONS FOR DENYING THE WRIT

I

Petitioner Did Not Raise the Constitutional Issue Timely or Properly in the Courts Below, as She Failed to Raise the Constitutional Question Prior to Her Petition for Rehearing to the Supreme Court of Mississippi.

It is well established that a constitutional issue will not be considered by this Court unless the constitutional question has been both timely and properly raised and decided in the lower court. "If both of these do not appear on the record, the appellate jurisdiction fails." *Crowell v. Randall*, 10 Pet. 368, 391, 9 L.Ed. 458, 467 (1836); See also *Cardinale v. Louisiana*, 394 U.S. 437, 22 L.Ed. 398, 89 S.Ct. 1162 (1969).

It is equally well established that a constitutional issue is not properly or timely raised when presented for the first time by petition for rehearing to the state supreme court. See *American Surety Company v. Baldwin*, 287 U.S. 156, 77 L.Ed. 231, 53 S.Ct. 98 (1932), *Missouri Pacific Railroad Company v. Hanna*, 266 U.S. 184, 69 L.Ed. 235 (1924), *Wall v. Chesapeake & Ohio Railway Company*, 56 U.S. 125, 65 L.Ed. 856, 41 S.Ct. 402 (1921), and *Jett Brothers Distilling Company v. Carrollton*, 252 U.S. 1, 64 L.Ed. 421, 40 S.Ct. 255 (1919).

The instant case is similar to *American Surety Company v. Baldwin, supra*. There the petitioner to this Honorable Court was surety on a supersedeas appeal bond. The principal defaulted, and an Idaho trial court entered judgment against the surety company without notice. The company protested the propriety of entering judgment against it without notice and an opportunity to be heard, but contested the trial court's action only on the basis of state law. The first instance that a federal claim was asserted by the surety company was on peti-

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tion for rehearing to the Idaho Supreme Court. In dismissing the company's Writ of Certiorari this Honorable Court observed:

> The contention that a federal right had been violated rests on the action of the trial court in entering judgment without giving notice and an opportunity to be heard. *The same ground of objection had been raised throughout the proceedings, but solely as a matter of state law.* There had been ample opportunity earlier to present the objection as one arising under the Fourteenth Amendment. 287 U.S. 156, 164, 77 L.Ed. 231, 236. (Emphasis supplied)

In the instant case Petitioner asserted in her motion for new trial and in her assignments of error and appellate brief to the Supreme Court of Mississippi (A-1 to A-18), that the locality rule should not have been applied to disqualify her expert witness. However, all her arguments were directed to challenging the locality rule as a matter of state law. Petitioner never contended that the application of the locality rule in this case violated the Fourteenth Amendment or any other constitutional provision until her counsel raised the constitutional point in the petition for rehearing to the Supreme Court of Mississippi.

Therefore, the constitutional issue in the instant case was neither properly nor timely raised below.

Admittedly there are two narrow exceptions to the general rule that constitutional issues must be raised prior to rehearing in the state appellate court. If it is apparent from the record that the lower court in fact decided the constitutional issue on rehearing, then this Court may proceed to review that decision; or if the decision of the state appellate court is an unanticipated one, such that the constitutional claim becomes available only after the appellate court's decision, then raising the constitutional issue on rehearing may be timely or proper. *Herndon v. Georgia*, 295 U.S. 441, 79 L.Ed. 1530, 55 S.Ct. 794 (1935).

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However, neither of these two exceptional circumstances is present in the instant case. First, the Supreme Court of Mississippi did not in fact decide the constitutional issue on rehearing, but rather summarily denied the petition. (Petitioner's A-7 to A-8) This denial was proper because Mississippi appellate procedure provides that constitutional questions may not be raised for the first time on appeal, *State v. Cabana Terrace, Inc.*, 247 Miss. 26, 153 So.2d 257 (1963), *Adams v. Board of Supervisors*, 177 Miss. 403, 170 So. 684 (1936). Furthermore, Rule 6, Rules of the Supreme Court of Mississippi (A-23), requires that any ground for appeal to the Supreme Court of Mississippi must be assigned as error or it may not be argued. As the constitutional question was not assigned as error (A-4 to A-5), Petitioner cannot show that the Supreme Court of Mississippi decided the question.

Secondly, the initial decision by the Supreme Court of Mississippi was not unanticipated as it reaffirmed a long history of Mississippi case law upholding the locality rule. See *Dazet v. Bass*, 254 So.2d 183 (Miss. 1971), and *Copeland v. Robertson*, 236 Miss. 95, 112 So.2d 236 (1959).

Furthermore, there is a practical and compelling reason why the Writ should be denied, a reason noted in *Cardinale*, supra, and that is that the record in the instant case is devoid of any arguments on the asserted constitutional issue. The Fourteenth Amendment challenge to the locality rule has not been briefed or argued, and this Court is therefore unable to determine whether error has been committed by the court below.

The instant case is distinguishable from *Street v. New York*, 394 U.S. 576, 22 L.Ed.2d 572, 89 S.Ct. 1354 (1969), where the constitutional issue was raised by oral motion at trial through defense counsel's specific mention of the First Amendment, and is likewise different from *Chambers v. Mississippi*, 410 U.S. 284, 35 L.Ed.2d 297, 93 S.Ct. 1038 (1973), where this Honorable

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Court pointed out by footnote that an assignment of error in a motion for a new trial addressed to the trial court specifically mentioned a Fourteenth Amendment violation, sufficiently preserving the point for appeal.

Petitioner here has not shown that she raised the constitutional issue at any stage of the proceedings before her petition for rehearing to the Supreme Court of Mississippi was filed. The alleged Fourteenth Amendment or other constitutional claim was not made by objection at trial, by motion for a new trial, or by assignment of error and appeal to the Supreme Court of Mississippi. (A-1 to A-18)

The petition for Writ of Certiorari to the Supreme Court of Mississippi should therefore be denied, for the reason that Petitioner has not established the jurisdiction of this Court under 28 U.S.C.A. Section 1257 (3) or any other jurisdictional statute of this Court, in that her petition does not show that the constitutional issue asserted was timely or properly raised and decided in the Court below.

II

The Court Below, in Reaffirming an Established Mississippi Rule That Expert Witnesses in Medical Malpractice Suits Are Not Qualified to Testify Unless They Are Familiar With Standards of Medical Practice in the Defendant's Locality, Did Not Decide a Federal Question of Substance, Nor Does Its Decision Conflict With Decisions of This Court.

Petitioner's argument against the application of the locality rule in this case assumes a detailed reasoning process. The thrust of Petitioner's argument seems to be that the standard for treatment of injuries such as she sustained is the same in every part of the country. An orthopedist practicing in Respondent's

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locality treats these injuries the same as an orthopedist anywhere, and, extrapolating further, any qualified orthopedist from anywhere is qualified to testify to the standard of care exercised by orthopedists in Laurel, Mississippi. Therefore, her argument goes, due process was violated when the trial court ruled that her expert witness was not qualified to testify in that he was not shown to be familiar with Laurel, Mississippi, standards. Of necessity Petitioner's argument assumes that there should be an exception to the strict locality rule for injuries which are treated the same everywhere in the country.

However, the Mississippi Court has not recognized such an exception. *Dazet v. Bass*, supra, and *Copeland v. Robertson*, supra.

The inescapable result of Petitioner's argument is that she is asking this Court to rule that Mississippi's locality rule is unconstitutional if applied in her case and other cases like hers. For her to prevail, the substantive law of Mississippi must be changed. Viewed in this light it is apparent that the issue presented is not a federal question of substance, but rather one of local effect only.

It is not the function of this Court to review by certiorari all private disputes, nor does it entertain cases simply because they may be interesting:

> This Court does not sit to satisfy a scholarly interest in such issues. Nor does it sit for the benefit of the particular litigants. *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 74, 99 L.Ed. 897, 901, 75 S.Ct. 614 (1955).

> It is very important that we be consistent in not granting the Writ of Certiorari except in cases involving principles settlement of which is of importance to the public as distinguished from that of the parties. *Layne & Bowler Corporation v. Western Well Works, Inc.*, 261 U.S. 387, 393, 67 L.Ed. 712, 714, 43 S.Ct. 422 (1923).

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See also *Sullivan v. Little Hunting Park*, 396 U.S. 229, 24 L. Ed.2d 386, 90 S.Ct. 400 (1969), dissenting opinion of Justice Harlan.

Whether Mississippi chooses to follow the strict locality rule in measuring qualifications of expert witnesses in medical malpractice suits is an issue for Mississippi, either through its legislature or its courts, to decide; if application of the rule in a particular case, such as this one, disqualifies the the plaintiff's only expert witness, the issue remains nonetheless one of local, not national, concern.

This Honorable Court has consistently shown deference to the states in allowing the states to decide matters of evidence and procedure which effectuate the presentation of cases involving state law. *Mobile, Jackson and Kansas City Railroad Company v. Turnipseed*, 219 U.S. 35, 55 L.Ed. 78, 31 S.Ct. 136 (1910), (upholding Mississippi's "statutory res ipsa loquitur doctrine" in railway employee injury cases); *West v. Louisiana*, 194 U.S. 258, 48 L.Ed. 965, 24 S.Ct. 650 (1904) (recognizing that the Fourteenth Amendment does not prohibit a state procedure allowing depositions of absent witnesses to be read at trial).

The United States Congress in enacting the Federal Rules of Evidence has provided that in many situations state evidentiary rules are to be applied in federal courts. For example, Rule 601 provides that where state law supplies an element of a claim or defense, then the state rule as to competency of witnesses shall be applied. Obviously, Rule 601 does not settle the question whether the Mississippi locality rule is constitutional; but it does show that Congress has recognized that evidentiary rules vary from state to state, and Congress has not attempted to impose a uniform standard on all federal courts sitting throughout the country.

It is indisputable that the right to present evidence at trial is a fundamental due process guarantee. The cases Petitioner

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cites all recognize this right. *Chambers v. Mississippi*, 410 U.S. 284, 35 L.Ed.2d 297, 93 S.Ct. 1038 (1973); *Morrissey v. Brewer*, 408 U.S. 471, 33 L.Ed.2d 484, 92 S.Ct. 2593 (1972); *Goldberg v. Kelly*, 397 U.S. 354, 25 L.Ed.2d 287, 90 S.Ct. 1011 (1970); *Jenkins v. McKeithen*, 395 U.S. 411, 23 L.Ed.2d 404, 89 S.Ct. 1843 (1969); *Baltimore & Ohio Railroad Company v. United States*, 298 U.S. 349, 80 L.Ed. 1209, 56 S.Ct. 797 (1935).

However, those cases are distinguishable from the instant case. *Morrissey*, *Goldberg* and *Jenkins*, supra, stand for the basic proposition that parties before quasi-judicial bodies have a right to present evidence in their behalf. In the instant case, the Mississippi Court has not ruled that Petitioner could not present evidence; rather it has ruled that the particular expert witness she presented was not qualified to testify. Petitioner had every opportunity to either employ an expert witness from the area of Laurel, Mississippi, or to have her out-of-town expert familiarize himself with standards of orthopedic practice in Laurel.

The case most closely akin to the instant case is *Chambers*, supra. There this Honorable Court held that the Mississippi rule prohibiting the impeachment of one's own witness, together with Mississippi's failure to recognize the "Declaration against penal interest" exception to the hearsay rule, kept the Defendant from placing before the jury the best evidence of his innocence. Faced with the strict application of these two rules of Mississippi evidence, the Defendant was completely barred from presenting evidence that another person had committed the crime he was charged with. In reversing the lower court, this Honorable Court went to great pains to point out that the Mississippi evidence rules were not *per se* unconstitutional, and emphasized that its ruling should not be taken as precedent for riding roughshod over "the respect traditionally accorded to the States in the establishment and implementation of their own criminal trial rules and procedures." 410

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U.S. 284, 302-303, 35 L.Ed.2d 297, 313. The same rationale should apply to civil suits, and this much Petitioner seems to concede (Petition, Page 9, Paragraph 2).

But *Chambers* is not like the instant case. Application of the locality rule did not bar Petitioner from presenting expert testimony; it simply compelled the trial court to rule that the one expert witness she produced at trial was not qualified to testify as he was not familiar with the standard of orthopedic treatment in Laurel, Mississippi.

Whether Mississippi continues to observe the locality rule, whether it chooses to recognize exceptions to the rule, or whether it abandons the rule completely, is a question the Mississippi court or legislature must decide, and is not a federal question of substance. Neither do decisions of this Court indicate that state rules of evidence cannot vary from jurisdiction to jurisdiction and still comply with essential requirements of due process of law as required by the Fourteenth Amendment and other constitutional provisions. The Petition for Writ of Certiorari to the Supreme Court of Mississippi should therefore be denied.

CONCLUSION

Respondents request the Court to deny the Petition for Writ of Certiorari to the Supreme Court of Mississippi.

Respectfully submitted

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400 Professional Building
P. O. Drawer 750
Hattiesburg, Mississippi 39401
Attorney for Respondents

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APPENDIX

BLEED THROUGH

In the Supreme Court of Mississippi

No. 48,385

Mrs. Ethel Knight, Appellant,

vs.

E. J. Holder, M.D. Individually and E. J. Holder, M.D., and James C. Bass, Jr., M.D., D/B/A Laurel Bone and Joint Clinic, Appellees.

CERTIFICATE

I, Julia H. Kendrick, Clerk of the Supreme Court of Mississippi, do hereby certify that the following Appendices are true and correct copies of pages (designated A-1-A-23) or parts thereof, of the official Record in the above styled cause, now on file in my office at Jackson, Mississippi, to-wit:

Motion for New Trial
Assignment of Errors
Brief of Appellant
Petition for Rehearing
Rule 6, Rules of the Supreme Court of Mississippi

I do further certify that the attached copy of Rule 6, of the Mississippi Supreme Court Rules, is true and correct, and the said Rules have been in full force and effect since their adoption on December 20, 1967.

WITNESS MY HAND AND OFFICIAL SEAL on this the 10th day of May, A. D., 1976.

/s/ JULIA H. KENDRICK
Clerk
Supreme Court of Mississippi

(Seal)

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In the Circuit Court for the Second Judicial District of Jones County, Mississippi

Mrs. Ethel Knight, Plaintiff,

vs. Cause No. 9105

E. J. Holder, M.D. Individually and E. J. Holder, M.D. and James C. Bass, Jr., M.D. D/B/A Laurel Bone and Joint Clinic, Defendants.

MOTION FOR NEW TRIAL

Comes now Mrs. Ethel Knight, Plaintiff in the above styled and numbered cause by and through her Attorneys of record, and moves this Court for a new trial on the merits of this case, and in support thereof would show unto the Court the following, to-wit:

1. The court erred in sustaining Defendant's motion to produce for Defendants and their Attorneys all X-rays made of Plaintiff's elbow and arm on or about June 19, 1967, or prior or subsequent thereto, being in the name of Plaintiff, or her married name Mrs. Sidney Knight and being under Laurel Bone and Joint Clinic X-ray No. 10557, or otherwise, as ordered by this court on the 11th day of April, 1974, for the specific reasons that said motion was unsworn, and copies of same as filed received by counsel for Plaintiff, by mail, less than three hours prior to the time set for hearing thereon, and upon hearing thereof over objections of Plaintiff's counsel, the court allowed an amendment to said motion whereby counsel for Defendants were allowed to add to said motion a sworn acknowledgement. The court further erring in ordering Plaintiff or her counsel to produce said X-rays although said X-rays were stated to be in the possession of Dr. Sidney C. Knight, son of Plaintiff, in New Orleans, Louisiana, without the jurisdiction of said court, and

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not being in the possession of either Plaintiff or her attorneys of record.

2. The court erred in invoking the "locality rule" barring Plaintiff's expert witness, Dr. Byron Unkauf of New Orleans, Louisiana, an imminently qualified orthopedic surgeon, from testifying in the presence of the jury for Plaintiff.

3. The court erred in refusing to allow Plaintiff to waive the doctor-patient privilege, after Plaintiff invoked same during the testimony of Dr. Thomas Blake of Jackson, Mississippi, a defense expert witness.

4. The court erred in sustaining defense objections to the introduction of medical bills and expenses incurred by Plaintiff for hospitalization and operative procedures performed on Plaintiff to attempt to correct or stabilize the non-union of the bone fragments in the area of Plaintiff's left elbow, the site of the original fracture operated on and treated by the Defendant E. J. Holder and made the basis of this action.

5. The court erred in granting certain instructions for the Defendant concerning the law in this case over specific objections of Plaintiff's counsel.

6. The court erred in denying certain instructions of Plaintiff concerning the law in this case for the specific reasons stated by Counsel for Defense against the allowance of said instructions.

7. The court erred in overruling objections of Plaintiff to evidence and testimony presented by Defendants.

8. The court erred in sustaining defense objections to evidence and testimony offered on behalf of Plaintiff.

9. That the verdict of the jury was neither supported by nor warranted by the evidence presented in this cause.

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10. That the verdict of the jury was against the overwhelming weight of the evidence presented in this trial.

Respectfully submitted

MRS. ETHEL KNIGHT
By: DAN A. McINTOSH, III
KENNETH CRAWFORD
Her Attorneys of Record

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In the Supreme Court of Mississippi

No. 48,385

Mrs. Ethel Knight,

Appellant,

vs.

E. J. Holder, M.D., Individually and E. J. Holder, M.D., and James C. Bass, Jr., M.D., d/b/a Laurel Bone and Joint Clinic,

Appellees.

ASSIGNMENT OF ERRORS

Comes now, Mrs. Ethel Knight, Appellant in the above styled and numbered cause, and feeling aggrieved at the judgment rendered by the Circuit Court of the Second Judicial District of Jones County, Mississippi, in Cause Number 9105 on April 17, 1974, and as corrected by order of said court on the 19th day of April, 1974, and assigns as error in said judgment and correction of judgment the following grounds of error:

1. THE TRIAL COURT ERRED IN INVOKING THE "LOCALITY RULE" BARRING PLAINTIFF'S EXPERT WITNESS, DR. BRYON UNKAUF OF NEW ORLEANS, LOUISIANA, AN IMMINENTLY QUALIFIED ORTHOPEDIC SURGEON, FROM TESTIFYING IN THE PRESENCE OF THE JURY FOR PLAINTIFF.

2. THE TRIAL COURT ERRED IN ITS REFUSAL TO ALLOW PLAINTIFF TO INVOKE THE DOCTRINE OF RES IPSA LOQUITUR AND RULING THAT THE ONLY NEGLIGENCE WHICH THE JURY MIGHT CONSIDER WAS THE IMPROPER PLACEMENT OF PINS.

3. THE TRIAL COURT ERRED IN REFUSING CERTAIN INSTRUCTIONS OF PLAINTIFF, CONCERN-

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ING THE LAW IN THIS CASE FOR THE SPECIFIC REASON STATED BY COUNSEL FOR DEFENSE AGAINST THE ALLOWANCE OF SAID INSTRUCTIONS.

4. THE COURT ERRED IN SUSTAINING DEFENDANT'S MOTION TO PRODUCE AS ORDERED BY THE TRIAL COURT ON THE 11TH DAY OF APRIL, 1974.

5. AND FOR OTHER ASSIGNMENTS TO BE MADE UPON THE ORAL ARGUMENT OF THIS CASE.

Respectfully submitted,

Attorneys for Appellant:

Hon. Dan A. McIntosh, III
P. O. Box 554
Collins, Mississippi 39428

Hon. Kenneth C. Crawford
P. O. Box 837
Collins, Mississippi 39428

By: Dan A. McIntosh, III
Attorney for Appellant

Attorney's Certificate

This is to certify that I, Dan A. McIntosh, III, one of the Attorneys for Appellant, Mrs. Ethel Knight, have this day delivered a true and correct copy of "Appellant's Assignment of Errors" unto Hon. Dorrance Aultman of Aultman, Pope, Aultman, Van Slyke and Tyner, Attorneys at Law, P. O. Box 750, Hattiesburg, Mississippi, 39401.

Witness my signature, this the 9th day of December, 1974.

Hon. Dan A. McIntosh, III

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In the Supreme Court of Mississippi

No. 48,385

Mrs. Ethel Knight,

Appellant,

vs.

E. J. Holder, M.D. Individually and E. J. Holder, M.D., and James C. Bass, Jr., M.D., d/b/a Laurel Bone and Joint Clinic,

Appellees.

BRIEF OF APPELLANT

Oral Argument Requested.

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POINT I

The Trial Court Erred in Excluding From the Jury the Testimony of Doctor Byron Unkauf.

The trial court erred in excluding the testimony of Dr. Byron Unkauf, an eminently qualified orthopedic specialist from New Orleans, Louisiana, under the antiquated "locality rule." Appellant strongly contends that Dr. Unkauf qualified in all respects as an expert witness in the speciality of orthopedics, but the trial court refused to admit his testimony because he had no personal knowledge of the standard of skill and care exercised by orthopedic surgeons in the Laurel, Jones County, area. As recently stated in 35 ATLA L.J. 60:

> "Because of the celebrated 'conspiracy of silence,' otherwise known as the notorious unwillingness of doctors to testify against their colleagues, joined to the basic rule requiring a victimized patient to produce expert medical evidence, the Plaintiff in a medical malpractice case is about as helpless as a trout tossed into the Sahara."

The unwillingness of doctors to testify against their colleagues, plus the sorry tactics of malpractice insurance carriers and medical societies to chill the willingness of doctors to testify for Plaintiffs in meritorious cases, strengthened by antiquated "locality rules" in various jurisdictions have become interwoven into an almost impenetrable shield for the medical profession. It has become well known that the first principal question of an attorney investigating a medical malpractice action, where negligence is highly suspected, is: "Can you get a doctor to testify against the Defendant doctor?"

In the instant case at bar the only orthopedic (bone and joint) surgeons in Laurel, Mississippi, are Doctors E. J. Holder and James C. Bass, Jr. both Defendants in the instant case, and Dr. Cleve Johnson, who testified for the defense in the

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instant case, all of whom are associated with each other in the Laurel Bone and Joint Clinic, practicing out of the same offices at 424 S. Thirteenth Avenue, Laurel, Mississippi. It is totally inconceivable that either of these specialists would testify against their fellow colleagues and associates, but strictly construing the "locality rule" presently invoked within the jurisdiction of the State of Mississippi, these three orthopedic surgeons, associated and practicing together, supposedly establish the unassailable standard of skill and care exercised by an orthopedic surgeon in the Laurel, Mississippi area.

As stated in the case of *Pederson v. Dumouchel,* 431 P.2d 973 (977), a case from the State of Washington:

> "the fact that several careless practitioners might settle in the same place cannot effect the standard of diligence and skill which local patients have a right to expect. Negligence cannot be excused on the ground that other in the same locality practice the same kind of negligence. No degree of antiquity can give sanction to usage bad in itself."

Again citing the *Pederson v. Dumouchel* case, 431 P2d 973 (Washington 1967):

> "The original reason for the 'locality rule' is apparent. When there was little intercommunity travel, courts required experts who testified to the standard of care that should have been used to have a personal knowledge of the practice of physicians in that particular community where the patient was treated. It was the accepted theory that a doctor in a small community did not have the same opportunities and resources as did a doctor practicing in a large city to keep abreast of advances in his profession; hence, he should not be held to the same standard of care and skill as that employed by doctors in other communities or in larger cities. Parenthetically, we note that the law of this jurisdiction has never recognized a difference in the professional competency of a lawyer in a small community

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from that of the professional competency required of a lawyer in a larger city.

"Now there is no lack of opportunity for a physician or surgeon to keep abreast of the advances made in his profession and to be familiar with the latest methods and practices adopted.

"The comprehensive coverage of the Journal of the American Medical Association, the availability of numerous other journals, the ubiquitous 'detail men' of the drug companies, closed circuit television presentations of medical subjects, special radio networks for physicians, tape recorded digests of medical literature, and hundreds of widely available postgraduate courses all serve to keep physicians informed and increasingly to establish nationwide standards. Medicine realizes this, so it is inevitable that the law will do likewise. Louisell and Williams The Parenchyma of Law (Professional Medical Publications, Rochester, N.Y. 1960) p. 183.

"*We have found no better statement of existing conditions. The 'locality rule' has no present-day vitality except that it may be considered as one of the elements to determine the degree of care and skill which is to be expected of the average practitioner of the class to which he belongs. The degree of care which must be observed is, of course, that of an average, competent practitioner acting in the same or similar circumstances. In other words, local practice within geographic proximity is one, but not the only factor to be considered. No longer is it proper to limit the definition of the standard of care which a medical doctor or dentist must meet solely to the practice or custom of a particular locality, a similar locality, or a geographic area.* (Emphasis added)

"The 'locality rule' had never been suggested in any English case. (Nathan, Medical Negligence (Butterworth

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& Co., Ltd. 157, p.21). In England, the same standard is applicable throughout the country. The extent of our country is such, however, that we hesitate to fix a definite geographic limit upon the standard of care—be it statewide or expanded to the Pacific Northwest, as suggested by plaintiff's requested instruction."

In commenting on the locality rule, the writer in Volume 32 ATLA L.J. 250 stated as follows:

> "the logical basis for the strict version of the 'locality' rule was sympathy for the isolated and beleaguered country doctor. Such indulgent rule should . . . not be deemed to be extinct since superseded, i.e., the reason for it has ceased to exist . . . the liberalization of the rule has been generated by transformations in American Life, medicine, and judicial attitudes. America is no longer a predominantly rural country . . . A concomitant development of our increased urbanization has been development of modern means of transportation and communication which provide ample opportunity for physicians in all parts of the country to keep abreast of medical advances . . . These modern developments have lead to a greater standarization of medical practice throughout the country."

Commenting further on the *Pederson* decision that writer further stated:

> "The instant case is noteworthy in taking cognizance of these developments and also because it forthrightly refuses to be an accomplice in the conspiracy of silence. It impressively and soundly *refuses to rubber-stamp a lax and low standard of care promulgated in their self-interest, by local practitioners.*" (Emphasis added)

In a recent Arizona supreme court case, *Kronke v. Danielson*, 499 P.2d 155 (1972) that court abrogated its archaic "locality rule" in malpractice actions against specialist holding in part:

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> "(W)e hold that for a Plaintiff to recover in a medical malpractice case involving a specialist, he must prove that the defendant specialist in his acts failed to meet the standards of care required of physicians in the same specialty practiced by the defendant . . . *since medicine recognizes a standard for specialists not based on geography, the law should join in upholding* such standards . . . (t)o qualify an expert to express an opinion on what that standard of care is for the specialty of the defendant, the party offering the witness must establish the witness' knowledge and familiarity with the standard of care and treatment commonly practiced by physicians engaged in the same type of specialty as the defendant." (Emphasis added)

In *Brune v. Belinkoff*, 235 N.E. 2d 793 (Massachusetts 1968) 82 Harvard L. Rev. 1781 the 88 year old "locality rule" in effect in Massachusetts was overruled, the court modernizing its rule stating that the new test for a specialist in such cases is whether, taking into account medical resources available to him, defendant used the "standard of skill and the average member of the profession practicing the specialty", and that the old "locality rule" was unsuited to present day conditions.

That court stated (p. 798):

> "Because of the importance of the subject, and the fact that we have been asked to abandon the 'locality rule' we have reviewed the relevant decisions at some length. *We are of the opinion that the 'locality rule' of Small v. Howard which measures a physicians' conduct by the standards of other doctors in similar communities is unsuited to present day conditions. The time has come when the medical profession should no longer be Balkanized by the application of varying geographic standards in malpractice cases.* (Emphasis added)
>
> "The proper standard is whether the physician, if a general practitioner, has exercised the degree of care and

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skill of the average qualified practitioner, taking into account the advances in the profession. In applying this standard it is permissible to consider the medical resources available to the physician as one circumstance in determining the skill and care required. Under this standard some allowance is thus made for the type of community in which the physician carries on his practice. See Prosser, Torts (3d ed.) 32 (pp. 166-167); compare Restatement 2d; Torts, 299A, comment g.

"One holding himself out as a specialist should be held to the standard of care and skill of the average member of the profession practicing the specialty, taking into account the advances in the profession. And, as in the case of the general practitioner, it is permissible to consider the medical resources available to him."

In *Wiggins v. Piver*, 171 S.E. 2d 393 (N.C. 1970) the court held that it was error to exclude testimony of Plaintiff's expert witness on the ground that he was not familiar with the practice in defendant's community. Similar rulings were stated in the aforecited *Pederson v. Dumouchel*, 431 P. 2d 973 (Washington 1967) and reaffirmed by the Washington supreme court in *Douglass v. Bussabarger*, 438 P. 2d 829 (Washington 1968) the court further holding in the *Douglass* case that the locality rule was rejected, and further that res ipsa loquitur was applicable to Plaintiff's claim and would "get her case to the jury", and that in establishing medical malpractice, the beleaguered Plaintiff is *not* confined exclusively to the expert testimony of the doctors.

In the case of *Naccarato v. Grob*, 180 N.W. 2d 788 (Michigan, 1970) the court in a lengthly decision stated in part:

"The reliance of the public upon the skills of a specialist and the wealth and sources of his knowledge are not limited to the geographic area in which he practices. Rather his knowledge is a specialty. He specializes so that he may

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keep abreast. Any other standard for a specialist would negate the fundamental expectations and purpose of a specialty. *The standard of care for a specialist should be that of a reasonable specialist practicing medicine in the light of present day scientific knowledge. Therefore, geographical conditions or circumstances control neither the standard of a specialist's care nor the competence of an expert's testimony.*" (Emphasis added)

At times it may become necessary to secure the expert testimony of one who resides some distance from the home of a defendant accused of malpractice, for it may be difficult to obtain a witness to testify against one who bears the very high professional reputation of defendant * * * What credence should be given to the expert's statements is another matter. That was the province of the jury.

The supreme court of Mississippi in the case of *Dazet v. Bass*, Mississippi 254 So2d 183 (187 and 188) stated:

"Dr. Dugas qualified as an expert witness but the trial court refused to admit his testimony because he had no knowledge of the standard of skill and care exercised by physicians in the Jackson area. Plaintiff contends with a great deal of force that the so-called 'locality rule' is no longer valid for the reason that physicians now attend the same colleges, receive the same post graduate courses in their specialties, and to the same seminars; that the standards of care for specialist should be and are the same throughout the country, and that geographical conditions or circumstances are no longer valid as controlling the standards of a specialist's care or competence. Conceding that there is considerable force in the agrument on this question, we are not convinced that the 'locality rule' should be entirely abolished, although that question is not necessarily reached for the reason that Dr. Dugas was dismissed from the stand and no offer was made to take

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> his testimony in the absence of the jury, nor was the substance of his testimony dictated into the record. When a party seeks reversal because of excluded testimony, he must either place the witness on the stand, ask questions, and have the answers made of record, or else the witness must be presented and there must be a specific statement of what the answers or testimony of the witness would be. The reasons for this rule are that the court must be able to see from the record itself whether the offered testimony would be material and of benefit to the merits of the case, and whether its exclusion was actually harmful and prejudicial to the offer."

Appellant respectfully submits that the instant case where Dr. Unkauf was qualified as an expert witness except that he had no personal knowledge of the standard of skill and care exercised by physicians in the immediate area of Laurel, Mississippi, and in which instant case the testimony of Dr. Unkauf was taken, in the absence of the jury, presents to this Honorable Court a proper case for repudiating the antiquated "locality rule" now in effect in its jurisdiction.

The doctor-defendants in the instant case at bar were both specialists in their field of orthopedics, both Board certified, not "country doctors," who should reasonably have been expected to have the same skill, knowledge and standard of care in operative procedure and treatment of the Plaintiff in this instant case as any other Board certified orthopedic surgeon, whether said other orthopedic surgeon from Laurel, Jackson, New Orleans, Louisiana, Atlanta, Georgia or New York City.

As a matter of practical public concern and as the law of this great state should we continue to shield negligent doctors, particularly negligent specialists, with the antiquated "locality rule"? Or is it not time to reassess our position in light of the advancement of training, post-graduate educational opportunities and

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other technical advancements of the medical profession in order to promote the welfare of the general public securing medical attention and to do our best to protect that segment of our society then their health, use of limbs, or very lives are at stake. In this day of rising medical costs and more specialization and associations of specialists should we be content to be satisfied with anything less than the best possible care for each patient, whether that patient is treated, hospitalized and operated on in Laurel, Jackson, Greenwood, Hattiesburg, New Orleans or New York City. If a medical doctor is to hold himself out to the public as a "specialist" in a certain field should we not require of him the same education, training, skill and expertise of other specialists, in his same field, no matter where located geographically?

* * * * * * *

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In the Supreme Court of Mississippi

Mrs. Ethel Knight, Petitioner,

vs. Cause No. 48,385

E. J. Holder, M.D., Individually, and E. J. Holder, M.D., and James C. Bass, Jr., M.D., d/b/a Laurel Bone and Joint Clinic, Respondents.

PETITION FOR REHEARING

Oral Argument Requested

ANDALMAN, BERGMARK, ADELMAN & STEINER
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By: MARTHA BERGMARK
Attorneys for Petitioner

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Petition for Rehearing

Petitioner Ethel Knight, by and through her Attorneys, petitions this Court for a rehearing in her case pursuant to Rule 14 of the Mississippi Supreme Court and in support of her petition would show the following, to wit:

1. Petitioner appealed to this Court from the jury verdict and judgment against her in her medical malpractice suit against the respondents in the Circuit Court of the Second Judicial District of Jones County. On December 22, 1975, this Court affirmed without opinion the judgment of the lower court. On January 6, 1976, the Court sustained petitioner's Motion for Enlargement of Time in which to file Petition for Rehearing and Supporting Brief, granting her until January 21, 1976, to file the said Petition and Brief.

2. Petitioner respectfully submits that this Court erred as a matter of law in failing to reverse the lower court judgment for error in the exclusion of plaintiff's only expert medical testimony. Petitioner submits that the evidentiary ruling of the lower court in excluding said testimony was contrary to state law and resulted in fundamental unfairness to petitioner in violation of her due process right to a fair trial guaranteed by the Mississippi Constitution and the Fifth and Fourteenth Amendments of the

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United States Constitution, for which reasons the judgment of the lower court must be reversed.

3. Petitioner respectfully submits that this is an exceptional case in which justice requires this Court to reconsider the evidentiary issue raised herein.

4. Petitioner therefore respectfully requests that this Court enter an appropriate order setting this case for oral argument on the question of whether this Court erred as a matter of law in failing to reverse the lower court judgment for error in the exclusion of plaintiff's only expert medical testimony.

Respectfully submitted

ANDALMAN, BERGMARK, ADELMAN & STEINER
By: MARTHA BERGMARK
224 Second Avenue
Hattiesburg, Mississippi 39401
Attorneys for Petitioner

Certificate

I, Martha Bergmark, Attorney for Petitioners, do hereby certify that I have this day served a true and correct copy of the foregoing Petition for Rehearing upon Dorrance Aultman, attorney for respondents, by mailing the same to him, postage prepaid, at his office address.

This 20th day of January, 1976.

MARTHA BERGMARK

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RULE 6 ASSIGNMENTS OF ERROR

(a) The appellant shall file an assignment of error on or before the due date of appellant's brief, as provided infra in Rule 7, Subsection (a). The assignment of errors shall set out separately and particularly each error asserted and intended to be urged, to which shall be appended a certificate that a copy thereof has been delivered or mailed, postage prepaid, to opposing counsel. Cross-appeals may be taken without bond, by the appellee and cross-appellant by filing his cross-assignment of errors at the time the brief of appellee is due under Rule 7.

(b) No error not distinctly assigned shall be argued by counsel, except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified.

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